



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 88RD of 1999**

**MARK WANYONYI ..... PLAINTIFF**

**- VERSUS -**

**SAMUEL MBUGUA ..... DEFENDANT**

**JUDGMENT**

Mark Wanyonyi (Plaintiff) was employed by the defendant as a conductor of the defendants mini bus no. KAC 464B. On 17.4.99 the plaintiff was fastening some timbers belonging to a passenger on top of the aforesaid minibus at Makande when the driver of the said motor vehicle negligently and without warning put the said vehicle in motion and accelerated in a high speed, as a result whereof the plaintiff fell down and sustained serious injuries. The particulars of negligence are set out under para. 6 of the plaint.

In his defence the defendant denied plaintiffs claims as set out in the plaint save that the accident occurred and that the plaintiff was his employee. The defendant alleged negligence and breach of duty by the plaintiff and prayed that the suit be dismissed.

At the hearing the plaintiff gave evidence and called Inspector Ali Ngoli who produced Police Abstract. The Inspector said he did not attend to the investigation but he had authority to produce the traffic file in police custody. He noted that investigation was not complete because the investigation officer was transferred.

The plaintiff testified. He said the driver was speeding to compete with another vehicle taking same directions. The driver did not hear when conductor/ plaintiff called to stop vehicle. By consent medical reports were admitted in evidence without calling the maker. The defendant also gave evidence and said that he had abandoned the business of matatu transport. He was informed of the accident. He was not present when accident occurred. The plaintiff and the driver Munyao had instructions not to carry any luggage. He said he was not liable at all the liability was between driver and the plaintiff. He admitted that there was a carrier at the top of the vehicle. Further evidence was given by one Musau Mateo who said he was driving the vehicle on that day. He admits that he loaded at Makande and he was stopped by passengers who were making noise. When he got out of the vehicle he found plaintiff had fallen down. He took plaintiff to hospital. He did not come to know how plaintiff fell down. Another defence witness was in the matatu but only heard a person had fallen from the matatu. He did not see or come to know who had fallen. Both Counsel made written submissions.

On the issue of liability it is quite clear that the plaintiff was carrying on his duties as a conductor when

the accident occurred. The evidence of the driver DW2 is not sound. He says he saw the plaintiff enter inside the vehicle. He said he was using the side mirrors. This evidence is not correct. He should have been able to see the conductor on the vehicle dealing with the passengers luggage as he drove off. As it was he was not aware that the plaintiff was outside or inside the vehicle when he drove off. The issue of not following instructions is not vital here. It is unbelievable that the owner of a matatu would forbid the carriage of passengers, the competition is so high ( a matter of common notoriety) that the owner of matatu would give such instructions. At the end of the day what matters is how much money was collected that day. The defendant said that he had hired the plaintiff only that morning. It is unbelievable that he had time at all to give instructions as to which passenger is to be carried. The vehicle had a carrier at the top. I find the defendant's evidence unbelievable. He is trying to avoid liability. What is important is that he admits the accident occurred and the witness saw the plaintiff having fallen down from the vehicle. There is no denial that the vehicle was not driven negligently. I find the driver was careless. If at all he was not authorized to carry luggage why did he allow the matatu to carry the timber from Mwembe Tayari to Makande as he says. I find him 100% liable for the accident and consequently the employer defendant is vicariously liable. On the issue of quantum the injuries are as described in the medical reports. That of Dr. Munyoki was first in time. Dr. Muthuuri also examined the plaintiff on 16.8.2001 at the request of defendant. The injuries disclosed are :-

1. Fracture of right femur.
2. Fracture of right tibia /fibula
3. Fracture of left femur
4. Cuts and bruises on both thighs.

Plaintiff was at hospital for 4 months. He still has K-nail in situ, the right lower limb is shortened by 2 c.m. he walks with a limp, he has deformity. He also has backache due to the shortening of his limb and limping and the K-nail requires to be removed. These injuries are serious. The defendant proposes an award of shs. 490,00/- relying on the authority of Boniface Nyaga Ngari –vs- Taristo Mugumbi Gikonyo, Nairobi. HCC. No. 3144 of 1999 where the plaintiff had suffered multiple injuries. This case was decided in 1993. The plaintiff has proposed an award in a sum of shs. 1.2. million and the authorities relied upon are listed and copies provided.

Upon giving consideration to the authorities and the submission of Counsel and that the plaintiff was 21 years of age when the accident occurred and that he still has in situ K-Nail to be removed by an operation and the permanent disability suffered I am of the view that a sum of 750,000/- is adequate compensation for pain suffering and loss of amenities. On the issue of special damages there was no proof of money expended in obtaining medical evidence. However, it is a matter of common knowledge that medical reports are paid for. I award shs. 2000/- pleaded. The same applied to police abstract. The charge for obtaining the same is printed in the form as 100/-. I allow the claim. The upshot is that judgment is entered against defendant for plaintiff on the basis of 100% liability in the sum of :-

General damages ..... 750,000/-

Special damages ..... 2,100/-

752,100/-

The plaintiff shall have costs and interest.

Dated this 25<sup>th</sup> day of October, 2004.

**J. KHAMINWA**

JUDGE

**25.1.04**

Khaminwa – Judge

Chege – Court Clerk

Mr. Sifuna

Mr. Omondi

Judgment read in their presence in open court.

J. KHAMINWA

JUDGE